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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-764

EDWARD BARRY, NATALE CALE, JOHN CATALANO, EDWARD FINN, HARRY SALVESEN, STEVE SENO and WILLIAM SWALLOW,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRAYER

The petitioners, Edward Barry, Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow, respectfully pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit in this proceeding entered on October 23, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below, is attached hereto and appears in Appendix "A".

STATEMENT OF JURISDICTION

The petitioners, Edward Barry, Natale Cale, John Catalano, Edward Finn, Harry Salvesen, Steve Seno and William Swallow, appealed their convictions in the United States District Court for the Northern District of Illinois to the United States Court of Appeals for the Seventh Circuit. On October 23, 1974, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction. A timely Petition for Rehearing was denied on November 21, 1974. (Appendix "B"). This timely Petition for Certiorari was filed within 30 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Government's use of grand jury subpoenas as an adjunct to post-indictment preparation of the case for trial constituted an impermissible misuse of the grand jury and its processes.

2. Whether all distinction between the common law crimes of bribery and extortion is extinguished when public officials are charged with extortion under color of official right pursuant to 18 U.S.C. 1951.

3. Whether the suppression of pretrial immunity orders for prospective trial witnesses made under the name and number of the then pending indictment was so prejudicial as to deny the defendants their Sixth Amendment right to the effective assistance of counsel.

4. Whether the admission of extensive and particularized evidence of a separate conspiracy, unconnected with the conspiracy charged purportedly to prove motive and intent as to two of the defendants was so inflammatory and prejudicial as to amount to a denial of a fair trial.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS INVOLVED

Title 18, Section 1951, U.S.C. states:

> Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same

State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Title 18, Section 1623, U.S.C. states:

False declarations before grand jury or court.

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or infor-

mation shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT OF THE CASE

The Petitioner, William D. Swallow, was charged in Counts I and XII of a sixteen-count Indictment. The petitioners, Edward Barry, Natale Cale, John Catalano, Edward Finn, Harry Salvesen and Steve L. Seno, were charged only in Count I of the Indictment. Swallow was found guilty of conspiracy to obstruct, delay and affect commerce by extortion (Count I); and of knowingly making a false material declaration to the grand jury (Count XII). Barry, Cale, Catalano, Finn, Salvesen, and Seno were convicted only on Count I, conspiracy to obstruct, delay and affect commerce by extortion under color of official right.

Trial was by a jury. Upon a verdict of guilty on the aforementioned counts, judgments of convictions were entered. Edward Barry was sentenced to the custody of the Attorney General for a period of four years. Natale Cale was sentenced to the custody of the Attorney General for a period of eighteen months. John Catalano was sentenced to the custody of the Attorney General for a period of two years under the provisions of Title 18, Section 4208(a). Edward Finn was sentenced to the custody of the Attorney General for a period of two years. Harry Salvesen was sentenced to the custody of the Attorney General for a period of two years. Steve L. Seno was sentenced to the custody of the Attorney General for a period of two years under the provisions of Title 18, Section 4208(a). William Swallow was sentenced to the custody of the Attorney General for a period of eighteen months on Count I, and a period of one year on Count XII, both sentences to run concurrently.

It is from these judgments and sentences that petitioners appealed.

All of the petitioners were at one time or another, assigned to the Vice Squad of the Eighteenth Chicago Police District, which is located on the near north side of Chicago and encompasses a large number of nightclubs and bars. During the relevant period, the Squad was composed of approximately fifteen officers, divided between the day and night shifts. All the officers were patrolmen except the vice coordinator who was a sergeant. He was in charge of the entire squad; and was in turn directly responsible to the District Commander. The duties of the vice officers included responsibility for enforcement of the liquor laws in the district.

The crux of the Government's case consisted of the testimony of seven former members of the vice squad in the Eighteenth District. Of the seven, five testified under immunity granted pursuant to 18 U.S.C. 6002. All testified concerning monthly collection of money from certain bars and taverns and distribution of that money to members among the vice squad. Payment of a monthly sum entitled a bar to membership in the "club" or the "vice club". The money collected each month was called the "package" or "vice package".

With the exception of Edward Barry, who was a sergeant and vice coordinator from approximately April, 1967 until August, 1970, all of these petitioners were patrolmen assigned to the Eighteenth District vice squad during various portions of the relevant period charged in the Indictment. The monthly collection and distribution had been going on more or less consistently since approximately 1961.

When Captain Braasch became the District Commander, members of the vice squad approached the then vice coordinator and explored the possibility of collecting the "package". The coordinator met with Commander Braasch. It was agreed that the vice coordinator and the men could reinstitute the "club", but that Braasch and he would accept no share. However, Braasch instructed him to obtain a list of bars that the vice men planned to collect from so that they could be reviewed.

Subsequently, the coordinator told the vice officers to prepare a list of club members which they did. He then showed Braasch the list and it was approved. But he was then warned to prepare a list each month reflecting the bars from which the vice men had collected.

In November, 1966 the vice men began collecting money on a monthly basis from a large number of bars located within the Eighteenth District. Officers Cello and Rifkin were primarily responsible for collection on the day-shift. Officers Mascolino and Napier were primarily responsible for doing so on the night-shift.

Most bars were required to pay $100 a month for membership in the "club". In return, they were to be free from "harrassment". That is, from arrest, and from any other activities by the vice squad. They would have a "friend at the station" should they ever require assistance in any difficulties with other officers not members of the vice squad.

In late 1966 or early 1967 several members of the vice squad held a meeting in the police station to discuss the "club". At that meeting the vice officers discussed the procedure for protecting the bars that were in the "club". They also discussed the amount that would be collected

as more bars sought to join. They reiterated that members of the "club" would not be subject to usual enforcement of liquor laws.

As the monthly collections were made by Cello, Rifkin, Mascolino and Napier, the list of bars and amount collected from each was prepared. Each month the list was given to the vice coordinator for review by the Commander. From about November, 1966 until March, 1967 the coordinator took the monthly list to the Commander. He would then examine it and, on occasion, cross off names of bars from which he did not want monies collected. When Sergeant Barry took over as vice coordinator, he assumed that monthly duty.

The money collected was in turn distributed among members of the vice squad monthly. The collectors usually kept $300 or $500 each for themselves, and turned over $150 to $250 to each of the other members of the vice squad as his share of the "package". This arrangement continued until approximately August, 1970, after which all of the money collected was given to the vice coordinator directly. He assumed the monthly responsibility of distributing the "packages".

During trial, forty-eight owners or employees of liquor establishments from which money had been collected testified they had made regular monthly payments. These payments had ranged from $100 to $150, and had been made to members of the Eighteenth District Vice Squad. The "club" members testified that the payments were made to avoid "harassment". That is to say, they were made so as to avoid arrest, spot-checks of licenses, spot-checks of identification for underage drinking, and other acts enforcing the liquor laws. The bar owners and operators testified that they were afraid they might lose business or possibly lose their liquor licenses if the payments were not made.

REASONS FOR GRANTING THE WRIT

1. THE GOVERNMENT ABUSED THE GRAND JURY PROCESS WHEN IT EMPLOYED THAT TRIBUNAL TO ASSIST IN THE PREPARATION OF AN ALREADY INDICTED CASE FOR TRIAL.

The record below discloses that after the return of the Indictment, the Government subpoenaed several tavern owners and operators in the Eighteenth Police District to appear before a grand jury. Each of the witnesses was asked one or two general questions; and, upon asserting his Fifth Amendment privilege, was excused by the foreman with the admonition that he would be notified if and when his attendance would again be required.

In fact, each of the witnesses was later notified by either an Assistant United States Attorney or a special agent of the Federal Bureau of Investigation to appear in the federal building. However, none of those witnesses were placed again before the grand jury, but rather were taken before a federal judge and granted immunity. Although the order purported to grant immunity for testimony at the trial, the witnesses were nevertheless appearing pursuant to an original grand jury subpoena. For that matter, they were served with trial subpoenas either contemporaneous with, or subsequent to the grant of immunity. None of the trial witnesses ever again appeared before a federal grand jury after having been granted immunity.

We urged, both at trial and in the Court of Appeals, that this course of action constituted a grave misuse of the grand jury by the Government. We claimed that the

"sole or principal purpose" for calling those individuals before the grand jury was to assist in the procuring of witnesses and otherwise in preparing the already indicted case for trial. *Beverly* v. *United States*, 468 F. 2d 732, 743 (5th Cir., 1972); *in re Russo*, 448 F. 2d 369, 374 (9th Cir., 1971).

The Government, on the other hand, has argued with persuasive eloquence that there was no misuse of the grand jury because:

1. None of those witnesses who testified at the trial of the cause testified before the grand jury after his grant of immunity. Consequently, the Government could not have utilized the grand jury as a post indictment preparation device;[1] and

2. There was no connection between this case and the post indictment appearances inasmuch as the grand jury was still conducting further investigations into police corruption in the Eighteenth District totally apart from the subject of the Indictment.

In its opinion the Court of Appeals for the Seventh Circuit recognized the usual impropriety of calling prospective witnesses before a grand jury for the purpose of preparing an already pending indictment for trial. The Court nevertheless concluded that the Government interrogated all of the witnesses on subjects relevant to a continuing grand jury investigation and only incidentally, if at all, on subjects relating to the then pending indictment.

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1. We never suggested that the grand jury was used only for discovery. The thrust of our complaint is that it was used as means of coercing attendance and testimony.

(Appendix "A", page 14). In deciding this, it is respectfully submitted, the Court must have totally ignored the evidence.

The record demonstrates beyond peradventure that the trial witnesses were called before the grand jury after indictment not, as the Government has claimed, in an ongoing investigation of police corruption in the Eighteenth District. Rather were they called solely, or at least predominantly for the purpose of employing the grand jury coercive power to lay a basis for subsequent trial immunity and testimony. In this regard, the testimony of Robert J. Chartier is typical and illustrative.

Mr. Chartier had been the manager of a tavern in the Eighteenth District. (Tr., 502).[2] On December 22, 1972, he was interviewed by the FBI and gave a statement. (Tr., 504). Well after the return of the Indictment, Mr. Chartier was subpoenaed to appear before a federal grand jury. (Tr., 505). He was asked only one question: "Mr. Chartier, from 1965 until today, have to ever paid any Chicago police officer any money?" To that question, the witness asserted his Fifth Amendment privilege. (Tr., 506). Two months later he appeared, *without further subpoena*, and pursuant to a telephone call, before a federal judge and was granted immunity. (Tr., 506).

Later the witness appeared at the office of the United States Attorney and gave a further statement to the FBI. (Tr., 508). He testified at the trial that he would not have given that statement had he not been previously

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2. References are to pages in the trial transcript. No Abstract or Appendix was prepared on appeal to the Seventh Circuit Court of Appeals.

granted immunity. (Tr., 509). Furthermore, he never again appeared before a federal grand jury to testify concerning police corruption in the Eighteenth Police District, or for any other reason whatsoever up to and including the time he testified at trial. (Tr., 508).

It is virtually impossible to conceive that the Government would contend seriously that there was no connection between the pending indictment and the grand jury appearances of almost every one of the trial witnesses. One is compelled to wonder why, after immunity was granted, was not a single witness ever again required to appear before the grand jury and give testimony; if the true purpose for calling the tavern owners was, as contended, a continuing investigation. The question answers itself. The Government never really contemplated grand jury testimony from those witnesses. The subpoena was used only as a vehicle to secure attendance of prospective witnesses when they were required by the Government; to coerce those witnesses into asserting their Fifth Amendment privilege under oath; and thereby to establish the grounds necessary for a subsequent grant of trial immunity. That simply is not, and cannot be a function of a grand jury in our society. Its utilization for that purpose by the Government constituted a blatant misuse of the grand jury necessitating suppression of evidence gained thereby.

The Constitution as adopted made no mention of the grand jury. It is in the Bill of Rights that we find the only reference to that tribunal. The framers, then, accepted as fundamental the existence and the nature of the grand jury as a defender of the liberty of the people.

Originally it was designed only to aid the Government and public officials in detecting and punishing crimes.

Tyranical kings from time to time even tried to turn it into an instrument to defeat popular government. By 1789, though, it had evolved at common law into a legal bastion standing between the Government, on the one hand, and the rights of the people on the other.

From the very inception of our nation it was intended to be under the supervision only, and not the control of the Judicial branch of Government. As a matter of fact, in cases of felony, the Fifth Amendment withholds federal judicial jurisdiction over a citizen's liberty until it is conferred by the voting of a true bill. Likewise, it was never the intention of the framers that the grand jury should regress so as again to serve as an arm of either the Executive or the Legislative Branch.

The grand jury is traditionally somewhat in the nature of a fourth, relatively independent branch of government. Though still accusatory, and even at times inquisitorial, it nevertheless still serves as a bulwark against unwarranted intrusion upon constitutional privileges and rights. It exists historically and happily for the protection of the individual against governmental action, and *never* as a tool for prosecutors. Indeed, the very concept of a prosecutor, unanswerable directly to the people, employing with impunity this secret inquisitorial body as an aid and adjunct to his prosecutorial activities must necessarily disturb the response of all who would remain free men. That is why any deliberate or inadvertent misuse of the grand jury process, striking as it does at the very soul of our constitutional form of government, necessitates immediate, drastic and permanent remedial action by this Court.

The Court of Appeals assumed that the defendants were not prejudiced; and, in so doing, also erred. Had the evi-

dence resulting from grand jury misuse been suppressed, a great portion of the testimony against these petitioners would have been affected. In any event, an infringement of basic rights so strikes at the core of our constitutional system as to be prejudicial in itself.

2. THERE WAS A FATAL VARIANCE BETWEEN COUNT I OF THE INDICTMENT, WHICH CHARGED EXTORTION UNDER COLOR OF OFFICIAL RIGHT, AND THE PROOF, WHICH ESTABLISHED, AT BEST, EXTORTION BY THREATS OF ECONOMIC HARM.

The Court of Appeals for the Seventh Circuit held that once the motivation for payments focuses upon the recipient's office, the conduct immediately constitutes extortion under color of official right. It follows that if the recipient is a public official, it is of no moment whatever whether he took the payments to perform his duties, not to perform his duties, or even for a purpose totally unrelated to his duties. (Appendix "A", page A-24). For all practical purposes, then, the Court erased all distinction between the common law crimes of bribery and extortion where public officials are involved. It is respectfully submitted that the Hobbs Act[3] never intended so radically to alter long established and accepted legal principles.

The Indictment charged only extortion under color of official right.[4] The evidence, though, demonstrated that the payers of the monies were motivated by a desire to pre-

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3. Title 18, Section 1951, U S.C.

4. The grand jury could have charged both types of extortion; but limited the indictment to color of official right.

vent the police from performing their legitimate duties, rather than to insure performance of those duties. As a necessary result, unless bribery is now totally included in the definition of extortion within the framework of the Hobbs Act, there was clearly a fatal variance between the Indictment and the proof. *Stirone* v. *United States,* 361 U.S. 212; *Ex parte Bain,* 121 U.S. 1, 10.

It has long been a fundamental rule of federal jurisprudence that a criminal statute must be strictly construed, and any ambiguity must be resolved in favor of lenity. *United States* v. *Wiltberger,* 5 Wheat 76, 95; *United States* v. *Halseph,* 342 U.S. 277, 280.

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with a purpose of Congress in proscribing evil or antisocial conduct." (*Bell* v. *United States,* 349 U.S. 81, 83.)

In any event, the Courts have consistently enjoined themselves from supplying criminal statutes with elements that Congress has chosen to omit. *Arroyo* v. *United States,* 359 U.S. 419, 424.

Standing alone, as it does in 18 U.S.C. 1951, the term "color of official right" is patently ambiguous. Furthermore, the Congress has elected not to limit or qualify the term in any way. Accordingly, applicable precepts of statutory construction mandate that the term be construed as it was at the common law.

Prior to statutory modification, the crime of extortion could be committed only by a public official. *United States* v. *Nardello,* 393 U.S. 286, 289; 4 *Blackstone Commentaries* 141; *Perkins on Criminal Law,* Second Ed., p. 368.

Official duty, then, is the key to extortion under color of official right at common law, and therefore, in the Hobbs Act. The officer must accept money to do something he was already under a legal duty to do. That is the essence of the crime, and only that can constitute a taking under color of official right. The money or thing of value must have been claimed or accepted as a matter of right by virtue of the office held. Consequently, the person paying must yield to official authority in order to obtain something he already had a right to obtain.

> "Extortion involves payment in return for something *to which the payer is already legally entitled.*" (emphasis in original) *United States* v. *Addonizio*, 451 F. 2d 49, 72 (3rd Cir., 1971), *cert. denied*, 92 S. Ct. 949.

It follows as a corollary that it is impossible for an officer to commit extortion under color of official right if he demands compensation or fees for services that it was not his official duty to perform. By the same token, an officer cannot commit the crime if he accepts or demands money or things of value to forego proper performance of his office. But that is exactly what the evidence proved in this case.

All of the victims were paying to avoid what they termed "harrassment". That term was variously defined as arrests, set-up arrests, identification checks, checks of women at the bar for possible B-girl activities, and the like. That motive was accepted by the Court of Appeals. There is nothing in the record below to show payments to officers in order to induce them to perform their duties. On the contrary, all of the payments were made solely to keep those defendants from exercising their assigned dut-

ies. This constitutes classic bribery, and not extortion under color of official right. *People* v. *Diogardi,* 203 N.Y.S. 2d 870, 168 N.E. 2d 683.

That is not to say, however, that bribery and extortion are always mutually exclusive under the Hobbs Act. The same fact situation may constitute both crimes; albeit not extortion under color of official right.

Thus, both *United States* v. *Hyde,* 448 F. 2d 815 (6th Cir., 1971), *cert. denied,* 404 U.S. 1058; and *United States* v. *DeMett,* 486 F. 2d 816 (7th Cir., 1973), involved just such a situation. Public officials were paid in order to influence their acts as public officials. Specifically they were to forego performance of their duty. At the same time, the victims testified that the payments were made because they were in fear of economic harm. Clearly, these were cases in which bribery and *statutory* extortion coincided.

That is not the situation in this case, however. The charge was extortion as at common law, which does exclude bribery by definition. The grand jury forewent charging extortion through wrongful use of economic fear. Consequently, when the Government proved that type of extortion while charging extortion under color of official right, there was a fatal variance.

3. THE DEFENDANTS WERE DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY THE SUPPRESSION OF CERTAIN PRETRIAL ORDERS GRANTING IMMUNITY TO SEVERAL DOZEN BAR OWNERS.

On March 22, 1973, an article appeared in one of the Chicago daily newspapers indicating that the Government had procured orders granting immunity to several

prospective witnesses against the defendants. The article further suggested that Chief Judge Edwin A. Robson of the District Court for the Northern District of Illinois had entered the orders pursuant to an *ex parte* motion by the Government, and that the Court had also ordered all of the motions, supporting papers and resulting orders suppressed.

On March 28, 1973, the defendants filed a motion before the Chief Judge in which they asked for an order lifting the suppression of those orders previously entered, if, as it appeared, they had been entered under the name and number of the case then pending in the District Court.

That motion for an order lifting suppression was denied. The suppression remained in effect until almost the close of the Government's case, at which time the trial judge ordered it lifted and the documents were furnished to counsel.

As suspected, all of the motions and orders had been entered under the name and number of the case then being tried. We take the position that the actions of the Chief Judge in this regard constituted a deprivation of the Sixth Amendment right to effective assistance of counsel.

The Court of Appeals for the Seventh Circuit held that the defendants had suffered no prejudice from the suppression of those orders prior to trial. In support of that holding, the Court reasoned that the defendants had no standing to contest the propriety of the grant of immunity, and therefore had no right to be present at the immunity hearings, or even to know of them. In this, it is respectfully submitted, the Court erred.

If counsel were to render effective assistance, they should at least have been aware of the matters presented under the name and title of the case. But that is precisely what was frustrated by the secret hearings and the suppression order.

It is not at all germane that defendants had no right to contest the propriety of the immunity orders. If, as the Court of Appeals urged, having no right to contest a motion deprives a defendant of the right to know of such motion, there arises the specter of clandestine proceedings at once strange and disquieting. A defendant similarly has no right to contest the propriety of a co-defendant's plea of guilty or his subsequent sentencing. However, no reasonable man would suggest that those proceedings could be conducted without knowledge or notice, since they are still part of the case and may affect other defendants directly or indirectly.

Even slight incursions into the area of constitutional privileges tread upon the rights of all. Covert trial proceedings, however secondary, limited and innocuous, offend the sensibilities of a free and open society and cry out for judicial correction. Nevertheless, unless this Court intervenes, the aegis of judicial approval has been cast over a practice, dangerous at best, whereby the Government is permitted to procure *ex parte* orders affecting defendant's rights, and then suppress those orders from that defendant and his counsel without any showing of necessity.[5]

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5. Both Judge Robson and the Court of Appeals for the Seventh Circuit suggested possible danger to those immunized witnesses if their identities became known. There were no findings of fact to indicate even the remotest possbility of danger to the safety of any of the prospective witnesses.

4. THE PETITIONERS WERE DENIED A FAIR TRIAL WHEN EXTENSIVE AND PARTICULARIZED EVIDENCE OF A SEPARATE CONSPIRACY, UNCONNECTED WITH THE CONSPIRACY ON TRIAL, WAS INTRODUCED PURPORTEDLY TO PROVE MOTIVE AND INTENT AS TO TWO OF THE DEFENDANTS.

The Government introduced evidence at the trial concerning a so-called "big club" ostensibly for the purpose of establishing intent and motive as to the defendants Braasch and Barry. This notwithstanding, that the "big club" conspiracy was not alleged in the Indictment and involved proof of facts and criminal activity totally separate from, and unconnected to the crimes charged. According to the Government, the evidence was probative of why Braasch and Barry would participate in and supervise the operation of the "little club" without any financial benefit.

Not content with establishing the existence of a "big club", the prosecutors assaulted the jury with a mass of evidence showing the most intricate details of the secondary uncharged conspiracy. Information was produced establishing a connection between the "big club" and gambling, prostitution, vice—even organized crime and racketeering. Names quite notorious to any reasonably aware Illinoisan were freely discussed, and payoffs ranging into the thousands of dollars a month were established. The

effect on the jury was devastating, and undiminished by any subsequent limiting instruction.[6]

None dispute the fundamental precept that evidence of another crime may be admitted where it explains the circumstances of, or motive for the crime charged; or tends logically to prove any element of the crime. *United States* v. *Wall*, 225 F. 2d 905, 907 (7th Cir., 1955), *cert. denied*, 350 U.S. 935; *United States ex rel. Durso* v. *Pate*, 426 F. 2d 1083, 1086 (7th Cir., 1970), *cert. denied*, 400 U.S. 995.

However, it is the responsibility of the trial judge to weigh the probative value of the evidence proffered as against the prejudicial effect to determine whether it should be admitted. *United States* v. *Pierson*, 419 F. 2d 1020, 1022 (7th Cir., 1969). And when the prejudicial effect outweighs the probative value, it can be an abuse of discretion for the trial court to admit the evidence. *United States* v. *Byrd*, 352 F. 2d 570, 575 (2nd Cir., 1965). As was said in *United States* v. *Page*, 426 F. 2d 1083, 1086, (7th Cir., 1970):

> "When it must be said that the probative value of such evidence, though relevant, is greatly outweighed by the prejudice to the accused from its admission, then the use of such evidence by a State may rise to the denial of fundamental fairness and due process of law."

Assume we accept the conclusion that the prejudicial effect of the *existence* of the contemporaneous conspiracy

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6. The Court of Appeals pointed to the acquittal of some defendants to show lack of prejudice. We point to the guilty verdict of the others to show the opposite effect. Actually, neither position is tenable inasmuch as it is impossible to speculate upon the mental processes of the jurors.

was outweighed by its probative value to prove motive and intent. Still no one could rationally suggest that it was necessary for the Government to elicit all the intimate, inflammatory and prejudicial details.

In *United States* v. *Ostrowsky*, 501 F. 2d 318 (7th Cir., 1974), the Court of Appeals for the Seventh Circuit was confronted with an almost identical situation. The defendants had been tried for violations of Dyer Act[7] and conspiracy to violate the Act. The Government was allowed to introduce evidence of a murder in order to prove the element of knowledge required for a conviction.

The Court of Appeals upheld the propriety of introducing such evidence. However, it was determined that the Government had proved more details than were necessary. Moreover, the proof of superfluous details was so prejudicial as to require a new trial. In so holding, Chief Judge Swygert reasoned, at 501 F. 2d 322, 323:

> "We would rule therefore that under those circumstances the probative value of a minimal amount of evidence pertaining to Croach's murder would outweigh its prejudicial effect. We are of the view, however, that the Government adduced a great amount of evidence pertaining to the murder that was unnecessary. By transgressing the bounds of necessity the Government went beyond the minimal amount of murder evidence we deem admissible * * * It was unnecessary for the Government to present Ostrowsky's reasons for killing Croach. * * * The evidence of the other crime need only be clear and convincing: *it need not, indeed should not, involve a trial within a trial.*" (Emphasis added)

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7. 18 U.S.C. 2313.

Similarly in this case, there was no conceivable need to subject the jury to all the intricate details of the "big club" conspiracy. The mere fact that it had existed and that two of the policemen had been members thereof was more than sufficient to show a motive why those two individuals would have cooperated with the "little club" without accepting any financial benefits. As a consequence, the admission of all the detailed evidence constituted a trial within a trial and was reversible error.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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